

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHARLES C. MATTES

v.

DEPARTMENT OF THE ARMY

DOCKET NUMBER

CH04328210415

DATE: 20 NOV 1984

OPINION AND ORDER

The agency has petitioned for review of an initial decision reversing appellant's removal for unacceptable performance.

BACKGROUND

Appellant, an Administrative Supply Technician, GS-7, with the Department of the Army (agency), was removed based on the agency's determination that his performance was unacceptable in two critical elements of his position. Major duty #4 required that appellant prepare various documents and reports, 95% of which were required to be timely. Major duty #5 required that appellant store and maintain equipment in accordance with certain stockage requirements. The agency charged appellant with substandard performance for the period from February 1, 1981 through January 24, 1982.^{1/}

^{1/} The notice of proposed removal did not charge appellant with failure to file timely reports in October, 1981, or in January, 1982.

The presiding official found that because the agency's performance appraisal system was not approved by the Office of Personnel Management (OPM) and implemented by the agency until October 1, 1981, the appellant could only be charged with regard to performance after that date.^{2/} Further, she found that appellant had not been given notice that his performance with regard to major duty #5 was deficient and that the charge relative to such duty therefore could not be sustained.

With regard to major duty #4, appellant was charged with late submission of 75% of the reports due in November, 1981, and 25% of the reports due in December, 1981. The presiding official found that appellant had failed to timely submit two reports for which he was personally responsible, both due at battalion headquarters by November 1, 1981, a Sunday. The reports arrived on Monday, November 2. The presiding official concluded that since there was no mail delivery on Sunday the untimely submissions were de minimus. Initial Decision (I.D.) at 5. Although never raised by appellant, the presiding official further found that the thirty-day period allowed appellant for improvement was not a reasonable time to demonstrate acceptable performance. I.D. at 6. Thus, the presiding official did not sustain the agency's action.

In its petition for review the agency raises three basic points of contention: that the presiding official erred in her application of the substantial evidence standard, that the presiding official erred in raising the issue of reasonableness of time for improvement sua sponte, and that, in any event, the period provided for improvement was reasonable.

The petition for review is hereby GRANTED under 5 U.S.C. § 7701(e)(1).

^{2/} The agency's performance appraisal system was approved by OPM as required by the Board in Griffin v. Department of the Army, MSPB Docket No. CH07528210163 (October 22, 1984). Hearing Transcript at 74-75.

ANALYSIS

An agency action pursuant to 5 U.S.C. § 4303 must be supported by substantial evidence. Parker v. Defense Logistics Agency, 1 MSPB 489 (1980). The Board's regulations at 5 C.F.R. § 1201.56 define substantial evidence as: "That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true."

In reviewing an initial decision, while we afford due deference to the presiding official's credibility assessments, the Board is free to substitute its own determinations of fact, giving the presiding official's findings only so much weight as warranted by the record and the strength of her reasoning. Weaver v. Department of the Navy, 2 MSPB 297, 298-99 (1980).

The presiding official's finding that appellant's untimely submission of two reports was de minimus is contrary to the overwhelming weight of the evidence of record. Timely submission of reports was demonstrated to be crucially important to the functioning of the Army Reserve system, not merely a technical requirement. Hearing Transcript (H.T.) 174, 194 and 252-254. The testimonial evidence is corroborated by the fact that the agency made timeliness a critical element of appellant's position. Thus, we find that the agency did present substantial evidence of the appellant's inadequate performance of major duty #4.

The issue of whether appellant was afforded a reasonable opportunity for improvement as required by 5 U.S.C. § 4302(b)(6), however, remains. The agency contends that the presiding official erred in raising this issue sua sponte, and in basing her ultimate findings on the resolution of this issue. We disagree. In Sandland v. General Services Administration, MSPB Docket No. PH04328310205 (October 22, 1984), the Board held that the agency must prove that an employee has been afforded a reasonable opportunity to improve as part of its prima facie case.

The presiding official determined that appellant was only afforded thirty days for improvement, based on a finding that appellant could not be charged with notice of his deficiencies until after OPM approved the appraisal system. Thus, she found that appellant was initially informed of the deficiencies in an unsatisfactory performance letter dated November 10, 1981. We find, however, that as early as June, 1981, appellant was informed that his performance was unacceptable and that timely submission of reports was critical. Under these circumstances, the thirty days afforded by the November 10, 1981 unsatisfactory performance letter would have been sufficient if the appellant was given reasonable opportunity to demonstrate improvement during such period. We find, however that no such opportunity was afforded.

In the notice of proposed removal the agency identified several "specifics which occurred during the thirty-day warning period" which commenced on November 10, 1981. The only reports on which appellant appears to have been judged had due dates of November 1 (3 reports) and December 1 (2 reports). The presiding official determined that three of the five reports were not the sole responsibility of appellant and that their delay was due to circumstances outside of appellant's control. We find no reason to disturb such finding. The two reports which appellant prepared personally were due November 1 and arrived November 2, 3/ prior to the commencement of the thirty day period. Thus, while we do not find that the untimely submissions, albeit only one day late, were de minimus, we do find that appellant had no opportunity to submit any of the reports for which he was personally responsible during the thirty day improvement period.

3/ Although the agency argued that one report had not been received as of the date of the proposed removal, appellant submitted a copy of the report dated October 20, 1981, at his reply and testified that it was in the same envelope as the report the agency acknowledged receiving on November 2, 1981.

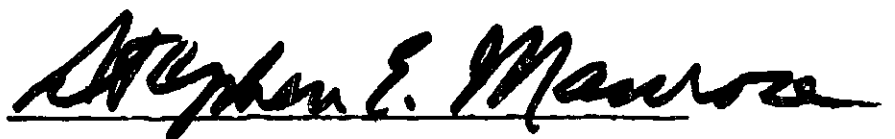
Because appellant was not afforded the requisite opportunity to demonstrate acceptable performance, the charges on which the agency based its action cannot be sustained. Accordingly, the initial decision is AFFIRMED as MODIFIED by this opinion and order, and the removal action is NOT SUSTAINED. The agency is hereby ORDERED to cancel appellant's removal and to award back pay and benefits in accordance with 5 C.F.R. § 550.805. Proof of compliance with this order shall be submitted to the Office of the Clerk of the Board within twenty (20) days of the date of this Order. In the event of agency noncompliance, a petition for enforcement may be filed with the Chicago Regional Office pursuant to 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the Court has jurisdiction, of the Board's decision by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Washington, D.C.



Stephen E. Manrose

Acting Clerk of the Board